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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
Broadcast Signal Carriage Issues	)	

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To: The Commission

REPLY COMMENTS OF
TRIBUNE BROADCASTING COMPANY

Comments filed in this Docket reveal that some members of the television industry have not yet come to grips with what Congress did, and did not do, in the Cable Television Consumer Protection and Competition Act of 1992. Congress did not repeal the cable industry's compulsory copyright license, or give program suppliers a tool that would enable them to achieve the same results contractually. Congress did enact a law that gives broadcasters the right to bargain with cable operators over the dissemination of their signals. Tribune Broadcasting Company submits that if the Commission keeps these fundamental points in mind, it will craft workable rules implementing this landmark legislation. If the Commission loses sight of these points, the Cable Act could become what a number of parties apparently hope it will become: a dead letter.

Tribune submits these brief Reply Comments to respond to a few points raised in the initial round of comments.

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Interestingly, most members of the cable industry, which vigorously opposed the legislation and is challenging its constitutionality in court, do not seek to undermine the law's efficacy by arguing that a station will be able to negotiate for retransmission consent only if it has obtained the consent of the program's copyright owner and is not a party to one or more program contracts that forbid it. Rather, apparently in the interest of facilitating retransmission consent negotiations, and creating as few legal obstacles to delivery of television signals to their subscribers as possible, cable commenters properly urge the Commission to view the right to grant retransmission consent as belonging exclusively to the broadcaster, independent of what its past, present and future programming contracts may say.[1] We respond to some of the comments that take a different view.

A. The Concept of "Contractual Intent" Is a Red Herring.

As pointed out in our initial comments[2], it has been customary in the television industry for decades for programming contracts to forbid the station-licensee to authorize retransmission of its signal. This was of no practical significance

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1. *See, e.g.*, Comments of National Cable Television Assn., Inc. at 36-39, Comments of The Community Antenna Television Assn., Inc., at 15-17, Comments of Tele-Communications, Inc. at 30-31, Comments of Continental Cablevision, Inc. at 25-27. There are exceptions, namely two cable operators with major activity in the program-supply business. *See* Comments of Time Warner Entertainment Co., L.P. at 56-57, Comments of Viacom International Inc. at 51-52.

2. Comments of Tribune Broadcasting Company at 11.

because, until October 6, 1993, the Copyright Act's compulsory license is all a cable operator has needed to carry a television signal. Other commenting parties acknowledge that these contract clauses have been the industry standard.[3] Certainly it cannot be claimed that license agreements entered into years ago were negotiated with the detailed provisions of the Cable Act in mind.

Nevertheless, it is argued that the intent of the contracting parties must be paramount to the rights created by the Cable Act. Viacom submits that the FCC should not presume that the parties "intended" to allow the broadcaster to grant retransmission consent without unambiguous contractual language. (Comments at 50-53.) The Motion Picture Association argues that the Commission must honor the parties' contractual intent, if they formed such an intent, and must defer to the courts to ascertain that intent if disputes arise.[4] A number of parties agree that if retransmission consent becomes a matter of contract interpretation, there will be a snowball of litigation, and the result will be fewer television signals seen by cable viewers.[5] This will be the result if the Commission allows retransmission consent to be granted only if stations obtain permission of their

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3. Comments of the U.S. Copyright Office at 13-15, Comments of Viacom International Inc. at 55. Indeed, Tribune Entertainment Company's contracts contained standard "no retransmission by cable" language.

4. Comments of Motion Picture Association of America, Inc. at 4.

5. *See, e.g.*, Comments of The Community Antenna Television Assn., Inc. at 14-16; Comments of Viacom International Inc. at 36 n.17.

program suppliers, who, enjoying the copyright monopoly, nearly always have greater bargaining power.[6] This was not the intent of Congress.

The problem with these arguments, aside from their leading inevitably to results contrary to congressional intent, is that they assume that retransmission consent is one of the bundle of rights that a program supplier may grant or withhold when it enters into a negotiation with a television station. But, as we demonstrated in our earlier Comments, these rights were granted to broadcasters by Congress, acting under its commerce powers to set national communications policy, not to program suppliers as a matter of copyright law. Even the Copyright Office acknowledges that "a requirement that broadcasters first obtain affirmative permission to retransmission consent of the programming before exercising such consent to the signal would frustrate the section 325(b)(1)(A) right by holding it hostage to the whim of copyright owners." (Comments at 15.) The Copyright Office recognizes that this interpretation would violate the Cable Act by modifying the cable compulsory license, contrary to Section 325(b)(6). Id.

In sum, the intent of contracting parties is relevant only if the parties have the power to contract with respect to a given right. There is nothing in the Cable Act or its

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6. Under this view of the statute, "the respective bargaining power of the parties will determine the extent to which retransmission consent authority is granted or circumscribed in program license agreements with [program] suppliers and with cable systems ... ." Comments of Fox, Inc. at 7.

legislative history to suggest that Congress intended program suppliers to be the source of retransmission rights, or program contracts to be the place they were granted or withheld.

B. There is No Parallel Between Retransmission Consent and Syndicated Exclusivity Issues.

The Commission will create a morass of uncertainty if it accepts the suggestion of some commenters[7] and allows the parties to "clarify" their contracts in the manner that followed adoption of the syndicated exclusivity rules. Stations will be faced with the task of negotiating with program suppliers — most of which are hostile to the compulsory license[8] — on the one hand, while dealing with multiple cable operators on the other. With a deadline looming on the near horizon and no way to guarantee that every contract for the next three years will permit retransmission consent, the station's statutory choice between must-carry and retransmission consent rights will be hollow, indeed.

The Commission should understand the clear distinction in kind between syndicated exclusivity rights and retransmission consent rights. If a station lacks syndex rights, it can still broadcast a program and reach every viewer in its market, over the air and by cable. Syndicated exclusivity merely gives the broadcaster the right to have duplicate exhibitions of the same

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7. *E.g.*, Comments of Time Warner Entertainment Company, L.P. at 53-4, 58-9.

8. *E.g.*, Comments of Fox, Inc. at 8 n.6.

program deleted. If the station is unable to obtain syndex protection, it loses only the right to be the exclusive source of the program in its market.

Retransmission consent, on the other hand, is the lifeline between the broadcaster and the majority of its audience that subscribes to cable television. If the syndicator withholds retransmission consent authority, the station loses the right to reach cable viewers, other than through must-carry rights, which do not guarantee local carriage, and do not obtain outside the station's local market in any event.

Thus, contrary to the suggestions of sports commenters[9] and others, there is no analogy to be made between syndex rights, legitimately a matter of contract between station and program supplier, and retransmission rights, which are legitimately a matter of contract only between a station and a multichannel video provider.[10]

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9. Comments of National Basketball Association and National Hockey League at 14. Tribune also disagrees with the NBA and NHL's position (Comments at 5) that a party other than a broadcaster or cable operator should be entitled to petition to enlarge or reduce a market from the presumptive ADI definition adopted by the Cable Act.

10. Another topic Tribune believes is beyond the scope of negotiations under the Cable Act is the right to "cherry pick," or contract for only a portion of the broadcaster's signal. In this regard, Tribune agrees with the position of NBA/NHL (Comments at 12) and NBC (Comments of National Broadcasting Company, Inc. at 11-14).

CONCLUSION

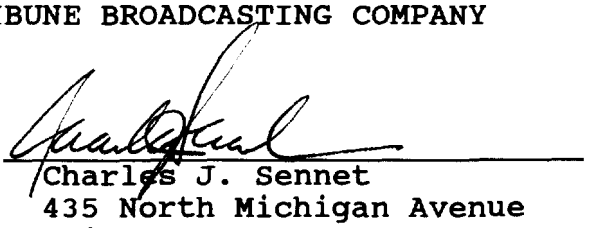
Tribune urges the Commission, as others have done, to avoid making life under the Cable Act any more complicated for cable operators, broadcasters or the Commission than is absolutely necessary. The Commission should bear in mind that the cable compulsory license was designed to facilitate cable systems' carriage of television signals, bypassing the contracting process. Copyright owners have longed for many years to recapture control over cable distribution of broadcast signals. We urge the Commission to resist their efforts to turn retransmission consent into an indirect form of copyright licensing of the cable industry.

For the foregoing reasons and those stated in our initial Comments, Tribune Broadcasting Company submits that the Cable Act should be interpreted so as to permit a station to exercise its statutory rights to elect mandatory carriage or

retransmission consent irrespective of what its past, present and future programming contracts may say about the subject.

Respectfully submitted,

TRIBUNE BROADCASTING COMPANY

By 

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Dated: January 19, 1993

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